IN THE COURT OF APPEALS OF THE STATE OF ALASKA

JAMES LANEAL LEE, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-12116 Trial Court No. 3PA-12-2415 CR MEMORANDUM OPINION No. 6770 — February 20, 2019

Appeal from the Superior Court, Third Judicial District, Palmer, Vanessa H. White, Judge.

Appearances: Gavin Kentch, Law Office of Gavin Kentch, LLC, under contract with the Office of Public Advocacy, Anchorage, for the Appellant. William M. Perry, Assistant District Attorney, Palmer, and Craig W. Richards, Attorney General, Juneau, for the Appellee.

Before: Mannheimer, Chief Judge, and Allard and Wollenberg, Judges.

Judge WOLLENBERG.

James Laneal Lee pleaded guilty to first-degree theft in the Palmer superior court for stealing property worth $25,000 or more from the Division of Forestry building

in Palmer.[1] Because he was a third felony offender, he faced a presumptive sentencing range of 6 to 10 years' imprisonment.[2]

At sentencing, Lee asked the court to impose a sentence that would be concurrent to the 16-year term that Lee had already received in three state cases from Anchorage and a federal case. The crimes in the three Anchorage cases (first-degree vehicle theft, fourth-degree escape, second-degree theft, third-degree (fear) assault, and reckless endangerment) were committed in 2012, shortly before and shortly after the events in the Palmer case, and the federal crime (felon in possession of a firearm) occurred in 2011.

Because Lee committed the offense in this Palmer case prior to the entry of judgment in any of his other cases, the superior court recognized that it had the authority to impose Lee's sentence concurrently to the sentences previously imposed.[3] But the court declined to do so. The court imposed a sentence of 8 years to serve, running completely consecutively to Lee's other sentences. Lee therefore has a composite sentence of nearly 24 years.[4]

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[1] AS 11.46.120.

[2] Former AS 12.55.125(d)(4) (pre-July 2016 version).

[3] *See Smith v. State*, 187 P.3d 511, 515 (Alaska App. 2008) (holding that, with the exception of consecutive sentencing required by AS 12.55.127(c), a consecutive sentence is only required when the defendant is sentenced for a crime that the defendant committed after judgment was issued against the defendant for an earlier crime); *see also McCombs v. State*, 754 P.2d 1129, 1131-32 (Alaska App. 1988) (holding that the trial court should have considered the defendant's state and federal time as a whole, and vacating consecutive sentence and imposing state sentence concurrently to time imposed in the defendant's federal case).

[4] In his brief to this Court, Lee's attorney mistakenly asserts that Lee received a composite sentence for the Anchorage state cases of 15 years *to serve* with an additional 4 (continued...)

Lee now appeals, raising two issues. First, Lee argues that the trial court mischaracterized the concept of community condemnation by narrowly focusing on the impact of Lee's conduct on the Mat-Su Valley community. We are not persuaded that the court's comments, when viewed in context, improperly construed the community condemnation criterion.[5] Rather, the court's comments appear to reflect its conclusion that the entirely concurrent sentence requested by defense counsel would fail to meet the *Chaney* criteria in light of the distinct criminal episodes and victims, in part by failing to give community condemnation *any* weight.

Second, Lee argues that the trial court was clearly mistaken in failing to impose some portion of the term of imprisonment in this case concurrent to the sentences in Lee's other cases. Lee argues that, given the court's finding that Lee's state cases were part of a "chain of criminal charges and convictions in 2012," the superior court failed to give sufficient consideration to "incremental sentencing" — the principle that a gradual increase in penalties is appropriate for each additional crime in a series of crimes committed closely in time.[6]

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[4] (...continued)
years suspended. Lee's trial attorney appeared to make a similar misstatement in his sentencing memorandum in this case. But at the sentencing hearing itself, both Lee and Lee's attorney explained (and the trial court acknowledged) that Lee received 11 years to serve in the Anchorage cases (15 years with 4 years suspended), a figure we have confirmed through direct review of the judgments in the three Anchorage cases. Lee was sentenced to an additional 4.75 years in the federal case.

[5] *See, e.g.*, *United States v. Flores-Machicote*, 706 F.3d 16, 22-23 (1st Cir. 2013) (recognizing that "a sentencing judge may consider community-based and geographic factors" and explaining that "the incidence of particular crimes in the relevant community appropriately informs and contextualizes the relevant need for deterrence").

[6] For a discussion of incremental sentencing, see *State v. Andrews*, 707 P.2d 900, 910 (Alaska App. 1985), discussing *Fair and Certain Punishment*, a report of the Twentieth (continued...)

The State argues that we should not view Lee's individual sentences as a composite and instead should view his 8-year term of incarceration in this case in isolation.[7] We disagree. A defendant's liberty should be restrained only to the minimum extent necessary to meet the *Chaney* criteria.[8] When a defendant is already serving other terms of imprisonment, those prior sentences are relevant to the judge's assessment of the appropriate sentence in the case before the judge.[9]

The State also argues that Lee's sentence is not clearly mistaken.

We conclude that the trial court's reliance on the sentencing goals of community condemnation and isolation to reject a fully concurrent sentence is supported by the record. As we indicated earlier, the court noted that this case involved a distinct criminal episode with different victims and different consequences. The court found that

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[6] (...continued)
Century Fund Task Force on Criminal Sentencing published in 1976 from which the Alaska Criminal Law Revision Subcommittee derived presumptive sentencing.

[7] The State also argues that this Court lacks jurisdiction to consider Lee's sentence appeal because Lee's 8-year sentence is within the applicable presumptive range. But based on our decision in *Mund v. State*, Lee has the right to appeal his sentence, and we have jurisdiction to hear Lee's appeal. *Mund v. State*, 325 P.3d 535, 537-38 (Alaska App. 2014).

[8] *Pears v. State*, 698 P.2d 1198, 1205 (Alaska 1985); *see also ABA Standards for Criminal Justice: Sentencing* § 18-2.4 (3d ed. 1994) ("Sentences authorized and imposed, taking into account the gravity of the offenses, should be no more severe than necessary to achieve the societal purposes for which they are authorized."), § 18-6.1(a) ("The sentence imposed should be no more severe than necessary to achieve the societal purpose or purposes for which it is authorized.").

[9] *See ABA Standards for Criminal Justice: Sentencing* § 18-6.5(g) (3d ed. 1994) ("In sentencing an offender who is subject to service of a prior sentence, a sentencing court should take into account the unexecuted part of the prior sentence in shaping a consolidated set of sentences."); *see also Smith v. State*, 187 P.3d 511, 520-29 (Alaska App. 2008) (treating the terms of imprisonment imposed in six different cases across two sentencing hearings as a composite sentence).

running the sentence in this case wholly concurrently with the sentence in the Anchorage cases would fail to give adequate weight to community condemnation. The court also noted Lee's long criminal history and concluded that he continued to present a risk to the public. These findings are supported by the record.

But we cannot tell from the record whether the court considered a *partially* concurrent sentence. It appears from the record that, once the court rejected a fully concurrent sentence, the court evaluated Lee's sentence in this case in isolation, without considering Lee's composite sentence as a whole.[10] We are unable to determine whether the court considered the total number of years that Lee would actually serve across all of his cases — and whether the *Chaney* criteria could be satisfied by the imposition of a sentence somewhere between no additional time (a fully concurrent sentence) and 8 years of additional time (a fully consecutive sentence) in light of that composite total.[11]

We acknowledge that defense counsel argued for a fully concurrent sentence and never expressly argued that the court should consider a partially concurrent sentence. But irrespective of the parties' positions at sentencing, the trial court has an

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[10] *See Moya v. State*, 769 P.2d 447, 449 (Alaska App. 1989) (noting with disapproval that "the sentencing explanation given by the superior court expressly indicates that the court believed consecutive sentencing to be appropriate, but it contains nothing to indicate whether the court specifically considered the appropriateness of the composite four-year term that resulted from imposing the entirety of Moya's two sentences to run consecutively"), *abrogated on other grounds by Jeter v. State*, 393 P.3d 438, 442 (Alaska App. 2017).

[11] *See Jeter*, 393 P.3d at 441-42 (recognizing that any sentence already imposed on a defendant in a related case may be pertinent to a later judge's assessment of the appropriate term of imprisonment). *Cf. Neal v. State*, 628 P.2d 19, 21 (Alaska 1981) (reviewing the combined length of a state sentence and a related federal sentence, even though the federal sentence was not subject to the court's review power and thus, not appealable).

independent duty to ensure that a defendant's sentence is reasonable.[12] This duty is consistent with the trial court's obligation to impose a sentence no more severe than is necessary to meet the goals of sentencing.

Because we are unable to determine whether the court considered the imposition of partially concurrent time, or why the court believed that no lesser sentence was sufficient to meet the *Chaney* criteria in light of Lee's already imposed 16-year term, we remand Lee's case to the trial court so that the court can have an opportunity to consider a partially concurrent sentence in this case.[13] We express no opinion on whether the court should impose a partially concurrent sentence.

We note that it is not clear that the superior court had the practical ability to run any portion of the sentence in this case concurrently with Lee's federal sentence, given that the federal court anticipatorily ordered Lee's federal sentence to run

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[12] *See Bland v. State*, 846 P.2d 815, 819 (Alaska App. 1993) (recognizing that a "sentencing court's duty to impose a reasonable sentence does not hinge on a specific request by the accused"; thus, a defendant's adoption of a neutral position at his sentencing hearing would not preclude him from raising an excessive sentencing claim on appeal). *Cf. United States v. Siegel*, 753 F.3d 705, 714 (7th Cir. 2014) (recognizing that a "judge is not required to accept the parties' agreed-upon sentencing recommendations, or even permitted to do so without first complying with his independent duty to determine the reasonableness of every part of a sentence").

[13] *See Perrin v. State*, 543 P.2d 413, 418 (Alaska 1975) (discussing "the importance of a thorough explanation for the sentence imposed by the trial judge").

consecutively with any state sentence.[14] This is an issue that can be addressed on remand, if necessary.

We REMAND Lee's case to the superior court for proceedings consistent with this opinion. We direct the superior court to transmit its decision to us within ninety days of the date of our decision.

Within thirty days of the superior court's new sentencing decision, Lee shall notify this court whether he wishes to renew his excessive sentence claim. If Lee wishes to renew his sentence appeal, he may request a supplemental transcript, if necessary. After certification of the record, Lee shall have thirty days to file a sentencing memorandum in this Court. The State shall then have thirty days to file a responding memorandum. We will then resume consideration of Lee's appeal.

If Lee does not wish to renew his excessive sentence claim, this appeal will be closed.

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[14] *See Setser v. State*, 566 U.S. 231, 244 (2012) (holding that a federal district court is authorized to order a federal sentence consecutive to an anticipated, but not-yet-imposed, state sentence). The United States Supreme Court has suggested that a conflict between a state court judgment and a federal court judgment regarding whether the respective terms of imprisonment are to be concurrent or consecutive is resolved by the order in which a defendant actually serves his state and federal sentences — deferring to the second sovereign's determination of whether to credit previous time served. *See id.* at 241; *see also Elwell v. Fisher*, 716 F.3d 477, 481-82 (8th Cir. 2013) (noting that a state court's intent regarding concurrent or consecutive sentences is generally not binding on the federal courts or the Federal Bureau of Prisons and discussing how the federal courts resolve conflicting judgments).